UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
FOUR QUARTERS WHOLESALE, INC.,	**)**	**Docket No. FIFRA-9-2007-0008**
	)	
Respondent.	**)**	

ORDER ON MOTION FOR ACCELERATED DECISION

I. Procedural History

The U.S. Environmental Protection Agency, Region 9 ("EPA" or "Complainant") initiated this action on May 9, 2007 by filing an Administrative Complaint charging Respondent, Four Quarters Wholesale, Inc., with 22 violations of Section 12(a)(1)(A) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j(a)(1)(A), arising from its alleged distribution and/or sale of five unregistered pesticides to individuals and businesses in California and other states throughout the Region between July 26, 2005 and March 30, 2006. The Complaint proposed a penalty of $6,500 per count for a total proposed penalty of $143,000, which EPA has since mitigated to $33,276 based upon considerations of ability to pay. *See*, Complaint at 10-11 and EPA's Rebuttal Prehearing Exchange at 1.

On June 15, 2007, Respondent filed an Answer to the Complaint. In the Answer, Respondent admitted distributing and/or selling the five products at issue for some period of time, but denied the violations and raised various affirmative defenses including that "USEPA is without jurisdiction to bring the herein matter as jurisdiction rests solely with the State of California." Answer at 2.

A Prehearing Order was issued on November 8, 2007 establishing, *inter alia*, filing deadlines for the parties' Prehearing Exchanges. Complainant timely filed its Initial Prehearing Exchange, but Respondent did not. Respondent filed a Prehearing Exchange on January 31. On February 14, 2008, Complainant filed its Rebuttal Prehearing Exchange along with a Motion for Default asserting that Respondent's prehearing filing was untimely and/or insufficient. Respondent opposed the Default Motion and filed an Amended Prehearing Exchange. The Default Motion was denied by Order dated March 18, 2008.

On March 14, 2008, Complainant filed a Motion for Partial Accelerated Decision on Liability ("Motion") alleging that there is no genuine issue of material fact regarding Respondent's liability for the 22 distributions and/or sales of the unregistered pesticide products. On or about March 31, 2008, Respondent filed its Opposition to Complainant's Motion

("Opposition") raising a number of issues in regard thereto including: 1) challenging whether EPA has adequately established that all the products sold were, in fact, "pesticides;" 2) claiming that the action is barred by the fact that the California Department of Pesticide Regulation (CDPR) has "primary enforcement power" over unregistered pesticides and that Respondent has already entered into a Settlement Agreement with CDPR in regard to the pesticide sales; and 3) alleging that EPA and CDPR conspired and otherwise acted in bad faith by inducing Respondent to first settle with the State regarding the pesticide sales on the understanding that by doing so all claims would be resolved, only to have EPA "sandbag" it by subsequently filing a Complaint relating to the same sales seeking additional penalties.

On April 14, 2008, EPA filed a Reply to Respondent's Opposition ("Reply") denying that it "coordinated, conspired, or even discussed [with CDPR] the strategy, scheduling, or procedural mechanics involving these two separate enforcement actions based on distinct statutory authority." Reply at 2. Further, EPA asserts that the claims in the two actions are not identical, that it was not a party to the settlement, and that therefore it is not limited in its authority to bring this action. Reply at 2-3. Additionally, in support of its assertion that the label of each product at issue makes a pesticidal claim, it refers this Tribunal to an on-line dictionary of translation and asks that judicial notice be taken that the Spanish word "desinfecta" means "disinfects." Reply at 3.

II. Standards for Accelerated Decision

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22 ("Rules of Practice," or "Rules"). Section 22.20(a) of the Rules of Practice authorizes an Administrative Law Judge to "render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *See, e.g., BWX Technologies, Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Belmont Plating Works*, EPA Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65, *8 (ALJ, Order Granting in Part and Denying in Part Complainant's Motion for Accelerated Decision on Liability, Sept. 11, 2002). Therefore, federal court rulings on motions for summary judgment under FRCP 56 provide guidance for adjudicating motions for accelerated decision under Rule 22.20(a) of the Rules of Practice. *See CWM Chemical Services, Inc*., 6 E.A.D. 1, 95 EPA App. LEXIS 20, *25 (EAB 1995).[1] Rule 56(c) of the FRCP provides that summary judgment "shall be rendered forthwith if

[1] *See also, Patrick J. Neman, d/b/a The Main Exchange,* 5 E.A.D. 450, 455, n.2, 1994 (continued...)

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law." Thus, summary judgment is to be decided on the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits" (FRCP 56(c)), but in addition, a court may take into account any material that would be admissible or usable at trial. *Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir 1993)(citing, 10A Charles A. Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 2721 at 40 (2d ed. 1983)); *Pollack v Newark*, 147 F. Supp. 35 (D.N.J. 1956)(In considering a motion for summary judgment, a tribunal is entitled to consider exhibits and other papers that have been identified by affidavit, or otherwise made admissible in evidence), *aff'd*, 248 F.2d 543 (3rd Cir. 1957), *cert. denied*, 355 U.S. 964 (1958). Such material may include documents produced in discovery. *Hoffman v. Applicators Sales & Service, Inc.*, 439 F.3d 9, 15 (1st Cir. 2006)(citing, 11 James M. Moore, *et al.*, Moore's Federal Practice § 56.10 (Matthew Bender 3rd ed.)(courts generally accept use of documents produced in discovery as proper summary judgment material)).

A motion for summary judgment puts a party to its proof as to those claims on which it bears the burdens of production and persuasion. For the EPA to prevail on a motion for accelerated decision where there is an affirmative defense as to which Respondent ultimately bears such burdens, EPA initially must show that there is an absence of evidence in the record for the affirmative defense. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). If the EPA makes this showing, then Respondent, as the non-movant bearing the ultimate burden of persuasion on its affirmative defense, must meet its countervailing burden of production by identifying 'specific facts' from which a reasonable fact finder could find in its favor by a preponderance of the evidence." *Id*.

Finally, while the Tribunal may look to the record as a whole in deciding upon a motion for accelerated decision, the burden of coming forward with the evidence in support of their respective positions rests squarely upon the litigants. *See*, *Northwestern Nat'l Ins. Co. v. Baltes*, 15 F.3d 660, 662-63 (7th Cir. 1994) (noting that judges "are not archaeologists. They need not excavate masses of papers in search of revealing tidbits -- not only because the rules of procedure place the burden on the litigants, but also because their time is scarce.").

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[1](...continued)
EPA App. LEXIS 10, *14 (EAB 1994) ("In the exercise of ... discretion, the Board finds it instructive to examine analogous federal procedural rules and federal court decisions applying those rules); *Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 524, n.10, 1993 EPA App. LEXIS 6, *26 n.10 (EAB 1993)(although the Federal Rules of Civil Procedure do not apply to Agency proceedings under Part 22, the Board may look to them for guidance); *Detroit Plastic Molding*, 3 E.A.D. 103, 107, 1990 EPA App. LEXIS 4, *9 (CJO 1990).

III. FIFRA Section 12(a)(1)(A)

The statutory provision which the Respondent is alleged to have violated is FIFRA Section 12(a)(1)(A) which provides in pertinent part as follows:

> . . . it shall be unlawful for any *person* in any State to *distribute or sell* to any person--
>
> (A) any *pesticide* that is *not registered* under [FIFRA § 3]

7 U.S.C. § 136j(a)(1)(A)(italics added). *See also*, 40 C.F.R. § 152.15. The term "person" under FIFRA is defined to include individuals and corporations. 7 U.S.C. § 136(s). "To distribute or sell" means "to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver." 7 U.S.C. § 136(gg). *See also*, 40 C.F.R. § 152.3(j).

FIFRA Section 2(u) defines a "pesticide" in pertinent part as -

> any substance or mixture of substances *intended* for preventing, destroying, repelling, or mitigating any *pest* . . .

7 U.S.C. § 136(u)(1)(italics added). *See also*, 40 C.F.R. § 152.3. Under FIFRA, the term "pest" is defined to include "any insect . . . bacteria, or other micro-organism." 7 U.S.C. § 136(t). *See also*, 40 C.F.R. § 152.5 (the Administrator has declared that "any insect . . . bacteria, or other micro-organism" is a "pest under circumstances that make it deleterious to man or the environment").

Additionally, the implementing regulation to FIFRA Section 2(u) provides in pertinent part:

> A substance is considered to be *intended* for a pesticidal purpose, and thus to be a pesticide requiring registration, if:
>
> (a) The person who distributes or sells the substance claims, states, or *implies (by labeling* or otherwise):
>
> (1) That the substance (either by itself or in combination with any other substance) can or should be used as a pesticide;
>
> * * *
>
> (c) The person who distributes or sells the substance has actual or constructive knowledge that the substance *will be used* or is *intended to be used* for a pesticidal purpose.

40 C.F.R. § 152.15(italics added). *See also, N. Jonas & Co. Inc.*, 1978 EPA ALJ LEXIS 3, at

*28-29 (ALJ, July 27, 1978), *aff'd*, 666 F.2d 829 (3rd Cir. 1981)(chlorine product held to be pesticide despite disclaimer because label indirectly implied product could be used to control algae).

FIFRA Section 3, 7 U.S.C. § 136a, sets forth the general procedure for the registration of pesticides by the Administrator of EPA after examination its ingredients, packaging, and labeling, *etc*. and determination that the product will not have an unreasonable effect on humans and the environment. Registered pesticides are assigned registration numbers which are required to appear on the products sold. 40 C.F.R. § 156.10(a)(1)(iv)-(v).

IV. Complainant's *Prima Facie* Case of Liability

In its Motion, Complainant alleges that for each of the twenty-two counts of the Complaint, it can establish as undisputed the following four elements of a FIFRA Section 12(a)(1)(A) violation: (1) Respondent is a "person;" (2) Respondent "distributed or sold" the products at issue; (3) the products at issue are "unregistered,"and (4) the products at issue are "pesticides," and thus required to be registered at the time of sale. 7 U.S.C. § 136j(a)(1)(A).

As to the first element, Complainant notes that Respondent has admitted that it is a corporation and therefore a "person," within the meaning of FIFRA as that term is defined under FIFRA Section 2(s), 7 U.S.C. § 136(s). *See*, Answer ¶ 1; Respondent's Prehearing Exchange [Amended] dated February 28, 2008 ("R's PHE") at 3. *See also*, Motion, Ex. 5 (Printout evidencing Respondent is registered as a corporation in the State of California).

As to the second element, Respondent has also admitted that it "distributed or sold," the products at issue as those terms are defined by FIFRA Section 2(gg). *See*, Answer ¶ 1; R's PHE 3-7 (Respondent indicates that it "does not deny selling the product" as to each count). *See also*, Motion, Ex. 2 (invoices evidencing Respondent's sale of the products at issue on the dates specified in the Complaint).

As to the products being unregistered as pesticides with the Administrator, Complainant submits the Affidavit of Julie Jordan, an EPA Environmental Protection Specialist and the case developer assigned to this matter, dated March 2008, in which she states --

> I reviewed the EPA's national pesticide database to identify any active EPA Product Registration Numbers for the trade names provided on the labeling of the five violative products: (1) "Clorox Concentrado;" (2) "Fabuloso Pasion De Frutas"; (3) "Fabuloso Fresca Menta"; (4) "Fabuloso Lavanda Citrica"; and (5) "Heavenly Scent Mothball Odor Eater." My review failed to identify any active EPA Product Registration Numbers for any of the five violative products under these names.

See, Motion, Ex. 4, ¶ 5.[2]

As to fourth and final element of the violations - that the five products at issue are all "pesticides," Complainant claims that four of the five products at issue (the Clorox Concentrado [bleach],[3] Fabuloso Pasion De Frutas, Fabuloso Fresca Menta and Fabuloso Lavanda Citrica) are "disinfectants that are intended to prevent, destroy, repel and/or mitigate bacteria and other microorganisms," which are included in the definition of "pests" under FIFRA Section 2(t). As to the fifth product at issue, Heavenly Scent Mothball Odor Eater, Complainant states that it is a product intended to prevent, destroy, repel and/or mitigate invertebrates or insects, which are also included in the definition of "pests" under FIFRA Section 2(t). As "further" evidence that the products are "pesticides," Complainant states that the labels on each of the five products make pesticidal claims, citing as proof thereof photographs of the product labels (Motion, Exs. 1, 3). Specifically, EPA notes that the labels on the Fabuloso Pasion De Frutas, Fabuloso Fresca Menta and Fabuloso Lavanda Citrica products state "antibacterial" and the Heavenly Scent Mothball Odor Eater label states "moth repelling," "made of quality camphor," and "very effective in keeping your clothes free from insects, moths, and mildew." The Clorox Concentrado bleach product states "desinfecta," which Complainant states is Spanish for "disinfects." Motion at 4-5.

In addition, Complainant sets forth in its Motion its arguments as to why each of the affirmative defenses raised by Respondent in its Answer does not create a contested issue of fact preventing the entry of liability at this point. To the extent applicable, those arguments are discussed below.

V. Respondent's Claim that there is Insufficient Proof that the Products are Pesticides

A. The Arguments of the Parties

In its Opposition to Complainant's Motion, Respondent challenges Complainant's *prima facie* case of violation only in regard to the fourth and final element identified above, that is whether Complainant has proffered sufficient evidence establishing that "the products in issue are actually pesticides." Reply at 4. It notes that there are no laboratory reports or chemical

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[2] In her Affidavit Ms. Jordan notes that while a valid registration number (EPA Reg. No. 5813-50), does appear on one of the products at issue, specifically the "Clorox Concentrado" product, that number is not valid for that particular product. Motion, Ex. 4, ¶ 4.

[3] "Clorox" is a registered trademark which has been used since 1912 by The Clorox Company to identify its line of bleaches and bleach containing products. *See, The Clorox Company v. TechLever Inc.*, Case No. D2001-0914/P, WIPO Arbitration and Mediation Center (Feb. 12, 2002), http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0914.html. Both Complainant in its Motion and Respondent in its Invoices refer to this product as "bleach."

analyses in the record proving the products are, in fact, "pesticides." *Id*. Moreover, Respondent objects to what it characterizes as the "testimony" of Complainant's counsel included in the Motion wherein, without citation, it states that the term "desinfecta" is Spanish for "disinfects." Respondent objects to such "testimony" as inadmissible in that no foundation has been laid evidencing that Complainant's counsel is competent to provide such translation. *Id.*

In Reply, Complainant asks the Court to take "judicial notice" that the English translation for the Spanish word "desinfecta" found on the label of the Clorox Concentrado bleach product is "disinfects," citing as authority therefor Webster's Online Spanish English Dictionary, http://www.webster-online-dictionary.org/translations/Spanish/desinfecta. Reply at 3.[4]

B. Analysis

Upon consideration of the evidence submitted, I find that Complainant has proffered sufficient evidence establishing that there is no genuine issue of material fact as to whether the five products at issue were "pesticides" requiring registration. It is not necessary for Complainant to submit a chemical analysis of each of the products to establish that they are pesticides. As noted above, 40 C.F.R. § 152.15 provides that "[a] substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if: (a) The person who distributes or sells the substance claims, states, or *implies* (by *labeling* or otherwise): (1) That the substance . . . *can or should* be used as a *pesticide*." "Pesticides" are substances which "prevent, destroy, repel or mitigate pests" and, under FIFRA, "bacteria" and "insects" are "pests." 7 U.S.C. §§ 136(t), 136(u)(1). The photographs included in Exhibit 1 to the Motion clearly evidence that the product labels affixed to the bottles of the Fabuloso Pasion De Frutas, Fabuloso Fresca Menta and Fabuloso Lavanda Citrica state "ANTIBACTERIAL." Similarly, the photographs of the labeling on the package containing the Heavenly Scent Mothball Odor Eater product states "moth repelling" and "very effective in keeping your clothes free from insects, moths, and mildew." Motion, Ex. 1. Thus, the labels on these four products clearly imply that they can be used to "prevent, destroy, repel or mitigate" bacteria or insects, *i.e.* pests under FIFRA. As such, they imply their use for a "pesticidal purpose" and so are pesticides requiring registration under FIFRA under 40 C.F.R. § 152.15.

As to the Clorox Concentrado bleach product, Complainant has proffered a photograph of

[4] "Bleach," the common name for the chemical compound sodium hypochlorite (NaOCl), is an established disinfectant. *See e.g.*, http://en.wikipedia.org/wiki/Sodium_hypochlorite. The Clorox company in fact publically touts its "Clorox® Regular-Bleach" product stating it "helps reduce the spread of germs around your home by killing common viruses, bacteria and fungi that can make your family sick." *See*, http://www.clorox.com/products/overview.php?prod_id=clb. However, under 40 C.F.R. §152.10, "bleaches" are "not considered pesticides" under FIFRA (*i.e.* by virtue merely of the pesticidal effect of their chemical formula) unless a "pesticidal claim is made on their labeling in connection with their sale and distribution."

the product's label which displays the word "Desinfecta" above the product name.[5] Motion, Ex. 3. Sideways over that original product label appears pasted an additional label which indicates that the product was "manufactured by Clorox De Mexico S. DE R.L. De C.V." and is a "Product of Mexico," (*id.*) suggesting that the labeling is in the Spanish language, commonly known to be the official language of the country of Mexico. Motion, Ex. 3.

It is well established that to determine the common meaning of a term, a court may utilize its own understanding of the term as well as dictionaries and scientific authorities. *AGFA Corp. v. United States*, 2007 Ct. Intl. Trade LEXIS 79 (Ct. Int'l Trade 2007) citing *Lynteq, Inc. v. United States*, 976 F.2d 693, 697 (Fed. Cir. 1992); *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1352 (Fed. Cir. 2002) ("To determine a term's common meaning, a court may consult 'dictionaries, scientific authorities, and other reliable information sources.'") (quoting *C.J. Tower & Sons v. United States*, 69 C.C.P.A. 128, 673 F.2d 1268, 1271 (1982)).

Moreover, courts routinely consult foreign language dictionaries regarding the meanings of foreign words, often not specifically taking judicial notice of the same. *See e.g., In re Bayer Aktiengesellschaft*, 2007 U.S. App. LEXIS 12100, *9-10 (Fed. Cir. 2007)(relying upon four online Spanish/English translation websites that demonstrate that "aspirina" is the Spanish-language equivalent of "aspirin" and has the same meaning to the "relevant purchasing public"); *Ramirez v. Debs-Elias*, 2005 U.S. App. LEXIS 8321 (1st Cir. 2005)(relying upon a Spanish-English dictionary to translate the Spanish word "disparate" as "nonsense" or "absurdity"); *Medellin v. Texas*, 128 S. Ct. 1346, 1384 (2008)(dissent)(relying upon a Spanish-English dictionary to translate "undertakes to comply"); *Gherebi v. Bush*, 352 F.3d 1278, 1292 (9th Cir. 2003)(relying upon a Spanish-English dictionary to interpret the Spanish word "*definitiva*" as "ultimate" in English); *United States v. Brito-Betancourt*, 52 Fed. Appx. 978, 980 (9th Cir. 2002)(relying upon a Spanish-English dictionary to translating the Spanish word "herramienta" as "tool").

This Tribunal's Oxford Color Spanish Dictionary 84 (2nd Ed. 2004) translates the Spanish word "desinfecta" as "disinfectant" in English. Various on-line Spanish-English dictionaries accessed by this Tribunal translate "desinfecta" as "disinfects." *See*, http://www.websters-online-dictionary.org/translation/spanish/desinfecta; http://www.wordreference.com/es/en/translation

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[5] The samples of the bleach products available for sale on the shelves of the Respondent wholesaler's showroom, as shown in photographs taken by the inspector on March 30, 2006 and attached to his inspection report (Motion, Ex.1), appear to have a store pricing label in whole or in part obscuring the term "Desinfecta" on the product's original label. However, there is no suggestion in the record that such pricing labels were affixed to the products actually distributed or sold to others by Respondent, and, in fact, attached to the Inspector's Declaration (Motion, Ex. 3) are additional photographs of the bleach product taken during the inspection as to which a pricing label does not appear affixed, and at least one of which clearly evidences the word "Desinfecta," above the product name.

.asp?spen=desinfecta. Respondent has not challenged the accuracy of Complainant's translation of the Spanish word "desinfecta" on the label as "disinfects"; Respondent challenges only Complainant's initial failure to cite any admissible evidence for such translation. Therefore, I find that there is no disputed issue of material fact that, in the Spanish language in which it is written, the label on the Clorox Concentrado bleach product states that it "disinfects."[6] In English, "disinfects" means to "to free from infection esp. by destroying harmful microorganisms." *See*, Webster's Third New International Dictionary 650 (Unabridged, 2002). In that under FIFRA, "micro-organisms" are "pests"and "pesticides" are substances intended to "prevent, destroy, repel or mitigate," I find the Clorox Concentrado bleach product sold by Respondent was a "pesticide" which had to be registered in order to be lawfully sold.

In reaching such conclusion, I also observe that the Spanish word "desinfecta," being so close in spelling to the English word "disinfect," would be taken even by those members of the general purchasing public fluent only in the English language to mean "disinfect," especially when appearing on a bottle labeled "Clorox." As such, even to persons not fluent in Spanish, the label *implies* that the product is a pesticide, that is, that it can be used to "destroy, repel or mitigate" micro-organisms.

Therefore, there is no genuine issue of material fact that each of the five products at issue in this case were pesticides which were required to be registered under FIFRA in order for them to be lawfully distributed or sold.

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[6] To any extent necessary, this Tribunal takes "official notice" of this translation and the meaning of any other words as to which this Tribunal cites a dictionary as a reference source therefor, pursuant to Rule 22.22(f) which provides in pertinent part that "[o]fficial notice may be taken of any matter which can be judicially noticed in the Federal courts." 40 C.F.R. § 22.22(f). Rule 201 of Federal Rules of Evidence in turn provides that Federal courts may take judicial notice of facts "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Dictionaries are such sources. *See e.g. Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801, 803 (9th Cir. 1989)(Relying upon a dictionary to take judicial notice of the meaning of the word "fraction"); *Hancock v. American Steel & Wire Co.*, 40 C.C.P.A. 931, 934 (C.C.P.A. 1953)(relying on a dictionary to define "cyclone" and "tornado," noting "Courts take judicial notice of the meaning of words . . . and the court may always refer to standard dictionaries or other recognized authorities to refresh its memory and understanding as to the common meaning of language.")(*citing*, *Nix v. Hedden*, 149 U.S. 304 (1893)).

VII. Respondent's Affirmative Defenses

A. Arguments of the Parties

In addition to proffering its *prima facie* case, Complainant proffers in its Motion various arguments to the effect that none of the myriad affirmative defenses raised by Respondent in the Answer prevent entry of judgment at this point as to Respondent's liability in this case. In response, Respondent has countered in its Opposition with arguments directed at some but not all of the affirmative defenses raised in its Answer. Those affirmative defenses, such as the statute of limitations, raised by Respondent in its Answer but not pursued by Respondent in its Opposition and which are relevant to liability are hereby deemed waived. *Blue Cross and Blue Shield of Ala. v. Weitz*, 913 F.2d 1544, 1550 (11th Cir. 1990)(Defendant's vague assertion of statute of limitations defense in answer is insufficient to defeat plaintiff's motion for summary judgment where the defense was not mentioned in the summary judgment record; defendant failed its initial burden of making a showing the defense is applicable.); *Diversey Lever, Inc. v. Ecolab*, 191 F.3d 1350, 1352-53 (Fed. Cir. 1999)("an affirmative defense must be raised in response to a summary judgment motion, or it is waived."); *Pantry v. Stop-N-Go Foods*, 796 F. Supp. 1164, 1166-67 (S.D. Inc. 1992).

In regard to Respondent's affirmative defense that EPA lacks jurisdiction to bring this action because such jurisdiction rests solely with the State of California, EPA states in its Motion that FIFRA Section 26, 7 U.S.C. § 136w-1, only gives the State of California "primacy," *i.e.*, primary enforcement authority, over certain pesticide "use" violations occurring within the State. However, it asserts that "a sale" is not a form of "use," noting that the phrases "to use any registered pesticide in a manner inconsistent with its labeling" and "to distribute or sell" are defined in the Act, at 7 U.S.C. §§ 136(ee) and 136(gg), in such a way that the two phrases are mutually exclusive. In further support of this argument, EPA cites to its "Final Interpretive Rule" on State Primary Enforcement Responsibilities under FIFRA, 48 Fed. Reg. 404 (Jan. 5, 1983) wherein it indicates that for the purposes of FIFRA Section 26, a "use violation" is defined as being limited to certain violations not including the sale or distribution of unregistered pesticides under Section 12(a)(1)(A). Moreover, EPA points out that the Settlement Agreement entered into between Respondent and the California Department of Pesticide Regulation (CDPR) only resolved Respondent's liability for state violations under California's Food and Agricultural Code Sections 12992 and 12993, which prohibit the sale of any pesticide not registered by the State, and has no bearing on Respondent's liability for violations of FIFRA, a Federal statute, which is at issue here. Motion 12-13.

In support of the validity of its affirmative defense, in its Opposition Respondent proffers the following facts as undisputed, providing documentary evidence in support thereof: that on November 7, 2006, in good faith, it entered into a Settlement Agreement with CDPR and paid a civil penalty of $2,912 in full settlement of all claims related to the sales of the five unregistered pesticides at issue here. Opposition ("Opp.") at 2, and Ex. A thereto. Upon receipt of Respondent's check in payment of the penalty, the CDPR advised Respondent by letter dated November 28, 2006, that "[t]his case is considered closed at this time." Opp. at 2, and Ex. B

thereto. The next day, November 29, 2006, EPA advised Respondent by letter of its intent to file a civil administrative complaint against it for FIFRA violations arising from its sale of the same pesticides, relying upon the same information gathered by the CDPR investigator, Ahmed Elhawary, which the State relied upon in issuing its complaint. Opp. at 2 and Ex. C thereto. Respondent characterizes this series of events as being "sandbagged by [C]DPR and the EPA." Opp. At 2.

Based upon these facts, Respondent makes two legal arguments. Respondent's first argument is primarily jurisdictional, that pursuant to 7 U.S.C. § 136v, California "regulates the sale and use of any *federally registered pesticide*" and has established an enforcement procedure for alleged violations regarding unregistered pesticide products such as those at issue here. Opp. at 3 (italics in original). The State has "primary enforcement power for use violations," and "if concurrent powers exist between the State and federal government with regard to sale violations, once the State has acted, the federal government should be precluded. It makes no practical sense to allow them both to enforce the same violations," Respondent suggests. *Id*. In this case, the State chose to act in regard to alleged violations which involved both intrastate and interstate sales and therefore Respondent claims "EPA cannot not [sic] step in once the state has acted first." Further, Respondent adds that "EPA knew of the violations before Respondent's settlement with DPR. Why didn't they [sic] try to step in and pursue the violations at that time?" *Id*. No legal authority is cited by Respondent in support of this argument.

Respondent's second argument is more equitable, raising an issue of fairness -

> The procedural history of this matter, unambiguously shows that the EPA and DPR acted in bad faith. There can be little doubt they conspired to bring two separate enforcement actions against Four Quarters, both relying on the same investigation report by Ahmed Elhawary of DPR. EPA notified Four Quarters of its case the day after DPR notified Four Quarters, they received their check and plan, and were closing their file. Julie Jordan, in her declaration attached to the moving papers boldly admits that she reviewed the report of Mr Elhawary of March, 2006 in deciding to bring the claim. She was aware of this for months and sat by while a small business such as Four Quarters, Inc. thought they were resolving all claims against them for products discussed herein by paying the fine to DPR and entering into the settlement agreement. Once the settlement was signed and the check cleared, EPA pounced. Such bad faith conduct should not be rewarded. The motion should be denied.

Opp. at 5-6. Again, Respondent cites no legal authority in support of this argument.

In Reply, although acknowledging that both the State and federal actions rely on the same CDPR inspection report, EPA denies that it "sandbagged," "conspired," or otherwise acted in bad faith in regard to Respondent, asserting that it "has handled this case at all times exactly as it has any other enforcement action based on federal pesticide law." Reply at 1. It further represents that it did not coordinate, conspire, or even discuss the "strategy, scheduling, or

procedural mechanics" of the two acts based "distinct statutory authority." *Id*. at 1-2. Rather, the two actions have proceeded from the start on "parallel but independent tracks." *Id*. at 2. The state action commenced and settled first, EPA states, simply because the state learned of the violations first and began acting on them before forwarding the inspection report to EPA. "Any purported correlation between the dates of correspondence received by Respondent from [CDPR] and EPA is purely coincidental and any alleged darker meaning attributed to such correlation is misconceived." Reply at 2. Complainant further reiterates that the settlement agreement is applicable only to state claims and that EPA was not a party to it, and so is not limited or bound by it. Reply at 2-3.

B. Analysis of Respondent Jurisdiction/Overfiling Defense

1. Is EPA's Right to Overfile for Sales Violations Limited by the Statutory Provisions of FIFRA or any Cooperative Agreement it Entered into with the State?

Although not explicitly designated as such, Respondent's jurisdictional argument in essence raises what is generally referred to as an "overfiling defense," in that EPA's process of duplicating a prior state enforcement action is referred to "overfiling." *Harmon Indus. v. Browner*, 191 F.3d 894, 898 (8th Cir. 1999). *See also*, *Bil-Dry Corp*, 9 E.A.D. 575, 591 n. 20, EPA App. LEXIS 1 *34 n. 20 (EAB 2001)("Overfiling refers to EPA's bringing an enforcement action after a State has brought a similar action on the same matter.")(*citing Int'l Paper Co.*, EPA Docket No. CAA-R6-P-9-LA-98030, 2000 EPA ALJ LEXIS 10 *28 (ALJ, Jan. 19, 2000) ("Overfiling is, at its essence, a claim that a regulated entity is being fined twice for the same conduct by a primary regulating authority and a related authority which derives its authority by a delegation from the primary authority.")).

There does not appear to be any controlling legal authority addressing the issue of EPA's right to engage in overfiling under FIFRA. The most recent decision touching upon the issue appears to be *Zoo Med Laboratories, Inc.*, EPA Docket No. FIFRA-09-0886-C-98-11, 1999 EPA ALJ LEXIS 49 (ALJ, July 28, 1999). In that case, the respondent, also a California corporation, was charged by the EPA with, *inter alia*, distributing unregistered pesticides under FIFRA to vendees in New York and other states. In defense thereof, the respondent argued that the case constituted unlawful overfiling on the basis that EPA had entered into a cooperative agreement with the State of New York for FIFRA enforcement and the State had already taken an enforcement action against Respondent regarding unlawful pesticide sales occurring during the same period as those alleged in the EPA action. As legal authority for its overfiling argument, the respondent cited FIFRA Sections 26 and 27 and *Harmon Industries, Inc. v. Browner*, 19 F. Supp.2d 988 (W.D. Mo.1998). *Zoo Med*, 1999 EPA ALJ LEXIS 49 at *15. Additionally, the respondent argued that the EPA action was barred by the doctrine of *res judicata* by virtue of the Order on Consent entered into by the State and Respondent resolving the State enforcement action. *Id*. Upon consideration, the Tribunal in *Zoo Med* found that those violations alleging sales to vendees in states other than New York were unaffected by the prior New York

enforcement action in that the Order on Consent by its terms evidenced that the State action covered only the New York sales and did not specifically relieve respondent of the obligation to comply with applicable provisions of federal or other laws covering sales to other jurisdictions. *Zoo Med*, 1999 EPA ALJ LEXIS 49 at *14, *19-20. Further, the decision found that those non-New York sale violations arose from a "separate and independent nucleus of operative facts" and there was no support for Respondent's assertion that New York could "usurp the EPA's role, not just in New York, but nationally, regarding the claims against Zoo Med." *Zoo Med*, 1999 EPA ALJ LEXIS 49 at *19.

However, the EPA violations involving the "same time period," "same class of violation," and same New York vendees as those addressed in the New York enforcement action, the Tribunal found, did legitimately raise an "overfiling issue." *Id*. at *23. After reviewing the *Harmon* decision and others, as well as FIFRA's statutory provisions, *Zoo Med* held that EPA can effectively cede or condition its authority to institute an overfiling action under FIFRA by entering into an agreement to that effect with a State, noting that:

> As provided in FIFRA Section 23 "the Administrator may enter into cooperative agreements with States . . . to delegate . . . the authority to cooperate in the enforcement of [the environmental pesticide control] subchapter . . ." 7 U.S.C. Section 136u. Section 26 adds that a State shall have primary enforcement responsibility for *pesticide use violations* as long as the Administrator has determined that the state has adopted adequate pesticide use laws and regulations and that it has adopted adequate procedures for the enforcement of them. Apart from this provision, FIFRA Section 26 (Section 136w-1) also provides that where a State has entered into a cooperative agreement with the Administrator under Section 136u for the enforcement of *pesticide use restrictions*, it shall have the primary enforcement responsibility for pesticide use violations. Finally, FIFRA Section 27 (Section 136w-2) provides that significant violations of the *pesticide use provisions* are to be referred by the Administrator to the appropriate State officials and in those instances where it is determined that a State is inadequately enforcing the provisions, and fails to correct the identified deficiencies, the primary enforcement responsibility may be rescinded.

Id. at *32-33(footnotes omitted, italics added).

The Tribunal then observed that EPA and New York had entered into a cooperative agreement under FIFRA Sections 26 and 27, which provided that:

> all *pesticide use cases* identified as significant will be referred to NYSDEC by EPA . . .' and that if EPA 'determines that the enforcement response to the violation is inappropriate, EPA will first attempt to negotiate an appropriate NYSDEC enforcement response.' Only after EPA determines that the state is unwilling or unable to alter its original enforcement response, and so notifies the State with a detailed explanation of the reasons the State's action is deemed

inadequate, may EPA bring its own enforcement action.

Zoo Med, 1999 EPA ALJ LEXIS at *34 (italics added). Noting that EPA had not alleged that such prerequisites had not been followed in the case before it, the judge dismissed the counts involving the sales to New York vendees "under the doctrine of res judicata by virtue of the FIFRA statutory provisions discussed above, and the cooperative agreement between EPA and the State of New York which emanated from those provisions." *Id*. at *35.

It is noted that neither party has cited *Zoo Med* in its pleadings and for a variety of reasons discussed below, the decision appears limited to its facts and inapplicable here.

First, *Zoo Med* ascribes its recognition of the existence of a valid overfiling defense under FIFRA based solely upon the district court's decision in the *Harmon* case. While that decision was subsequently upheld on appeal by the Eighth Circuit, *Harmon Indus. v. Browner*, 191 F.3d 894 (8th Cir. 1999), the decision has not been followed since by any federal court outside of the Eighth Circuit's jurisdiction. *See e.g., United States v. Power Eng'g Co.*, 303 F.3d 1232, 1240 (10th Cir. Colo. 2002), *cert. denied*, 123 S. Ct. 1929 (2003)(EPA overfiling permitted under the Resource Conservation and Recovery Act (RCRA); *Wyckoff Co. v. Environmental Protection Agency*, 796 F.2d 1197, 1201 (9th Cir. 1986)(federal enforcement authority under RCRA not displaced by state program); *United States v. Elias*, 269 F.3d 1003, 1010 (9th Cir. 2001)(RCRA allows EPA to exercise civil enforcement powers even where a state program is in effect). Moreover, the Environmental Appeals Board has indicated that *Harmon* is controlling precedent only for administrative cases under RCRA within the Eighth Circuit's jurisdiction. *See, Bil-Dry Corp.*, 9 E.A.D. 575, 590, 2001 EPA App. LEXIS 1, 32-33 (EAB 2001).[7]

On the other hand, EPA's authority to engage in overfiling has generally been held to be permissible under the various other environmental statutes it enforces, even where there are delegated State enforcement programs in place. *See e.g., United States v. LTV Steel Co., Inc.*, 118 F. Supp. 2d 827, 835(N.D. Ohio 2000)("it is permissible for the EPA to seek penalties against a defendant for a violation of the Clean Air Act (CAA) even after that defendant has agreed to pay a penalty to a local environmental enforcement agency in connection with that same conduct."); *United States v. SCM Corp.*, 615 F. Supp. 411, 419 (D. Md. 1985)(state action enforcing same standards as under federal law does not limit defendant's liability under CAA); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1090-1091 (W.D. Wis. 2001)(overfiling permitted under the CAA); *Southern Ohio Coal Co. v. Office of Surface Mining*, 20 F.3d 1418, 1428 (6th Cir. 1994), *cert. denied*, 513 U.S. 927 (1994)(overfiling allowed under the Clean Water Act (CWA)); *United States v. City of Youngstown*, 109 F.

[7] This action obviously does not involve RCRA, and would not appear to fall within the jurisdiction of the Eighth Circuit, as it involves a California company with sales within that state and interstate to Arizona, New Mexico, Nevada, and Texas. Thus, *Harmon* obviously would not be controlling precedent here.

Supp.2d 739, 741 (N.D. Ohio 2000)(same); *Britton Construction Corp*., 8 E.A.D. 261 n. 24 (EAB 1999)(The plain language of the CWA does not limit the power of the EPA to pursue an action where the state entity has already sought enforcement and issued a consent order concerning similar matters, or where there are ongoing proceedings in state courts or ongoing enforcement actions on behalf of authorities for a state.).

Second, the *Harmon* decision grounded its recognition of the validity of an overfiling defense in a RCRA enforcement action in the unique language of RCRA's Section 3006(b), which broadly states that an authorized state program operates "*in lieu of* the Federal program under this subchapter in such State." 42 U.S.C. § 6926(b). FIFRA contains no such "in lieu of' language, but instead refers only to "cooperation" and "cooperative agreements" between the Agency and the State as to enforcement. *See*, FIFRA Sections 22 and 23, 7 U.S.C. §§ 136t, 136u.

Furthermore, in regard to enforcement, FIFRA Section 26, provides that States shall have "primacy" only as follows:

> (a) In general. For the purposes of this Act, a State shall have primary enforcement responsibility for *pesticide use violations* during any period for which the Administrator determines that such State–
>
> > (1) has adopted adequate *pesticide use laws* and regulations . . . [and]
> > (2) has adopted and is implementing adequate procedures for the enforcement of such State laws and regulations; and
> > (3) will keep such records and make such reports showing compliance with paragraphs (1) and (2) of this subsection as the Administrator may require by regulation.
>
> (b) Special rules. Notwithstanding the provisions of subsection (a) of this section, any State that enters into a cooperative agreement with the Administrator under section 23 of this Act for the enforcement of pesticide *use restrictions* shall have the primary enforcement responsibility for pesticide *use violations*. Any State that has a plan approved by the Administrator in accordance with the requirements of section 11 of this Act that the Administrator determines meets the criteria set out in subsection (a) of this section shall have the primary enforcement responsibility for *pesticide use violations*. . . .

7 U.S.C. § 136w-1(a),(b) (italics added).

Section 27(a) of FIFRA provides further that –

> (a) Referral. Upon receipt of any complaint or other information alleging or indicating a significant violation of the *pesticide use provisions* of this Act, the Administrator shall refer the matter to the appropriate State officials for their investigation of the matter consistent with the requirements of this Act. If, within

> thirty days, the State has not commenced appropriate enforcement action, the Administrator may act upon the complaint or information to the extent authorized under this Act.

7 U.S.C. § 136w-2.

In reaching its decision, the *Zoo Med* Tribunal noted that "[i]n this context, the term "pesticide use" does not appear to be defined nor have the parties identified such an applicable definition. As used here, the term appears to relate broadly to the provisions of the Environmental Pesticide Control Subchapter." *Zoo Med*, 1999 EPA ALJ LEXIS 49 at *33, n. 17. That is not the case here, as EPA has explicitly argued that the term "pesticide use" in Sections 26 and 27 does not apply to pesticide *sales*. Respondent, on the other hand, appears to argue in its Opposition that the State either has primary enforcement jurisdiction over sales as well as use violations or, in the alternative, if the State and EPA have "concurrent enforcement powers" over sales violations under FIFRA, "once the State has acted, the federal government should be precluded." Opp. at 3.

Upon consideration, EPA's interpretation of FIFRA that it does not grant the States "primary" enforcement jurisdiction over pesticide "sales" violations appears correct. The legislative history of Section 26 and 27, which were added to FIFRA in 1978 (P.L. 95-396), indicate that they were enacted to give States more authority over in-state pesticide applicators and in-state applications. *See*, H.R. Rep. No. 95-663 (Oct. 5, 1977). In doing so, the legislators differentiated between applicators and their pesticide "*use*," *i.e*. the (instate) application or provision of a service involving pesticides on the one hand, and sellers/distributors and the (potentially interstate) "sale and/or distribution" of unused pesticides, on the other. *Id.* ("Section 1(1) would amend section 2(e)(1) of FIFRA by clarifying the definition of 'certified applicator' to provide that any certified applicator who holds or applies pesticides only to furnish a service of controlling pests without delivering any unapplied pesticide to any person so served is not deemed to be a seller or distributor under FIFRA"). The enforcement "primacy' which States can obtain is only in regard to pesticide "use," *i.e.*, misuse. *Id*. ("Section 17 increases the responsibility vested in the states for the prevention of pesticide misuse by making them primarily responsible for enforcement of the prohibitions on misuse."). This distinction is perfectly rational because each State's interest (and their jurisdiction) is primarily in and over its own citizens and protecting them from the health risks of misuse. Thus, it is simply more effective and efficient to place primary jurisdiction over interstate or multi-state sales transactions in the hands of a federal Agency with national enforcement authority.

Consistent therewith, after notice and comment, on January 5, 1983, EPA published its Final Interpretive Rule on FIFRA Sections 27 and 28. 48 Fed. Reg. 404 (Jan. 5, 1983). The Rule confirmed that States have enforcement primacy only over misuse violations, *i.e*. those involving the use of a pesticide in a manner inconsistent with its label or permit, *etc*., by, for example, noting that EPA would evaluate the adequacy of the State's enforcement response by taking into account the risks associated with the violative use, such as whether the violation occurred in a highly populated or environmentally sensitive area or near residences or schools, or

near food. 48 Fed. Reg. at 407-08. No provision was made to give States' primary authority over violations regarding the sale or distribution of unapplied or unused pesticides. 48 Fed. Reg. 404 (Jan. 5, 1983). In fact, neither the terms "sale" or "distribution" appear in the Rule, while the terms "use" and "misuse" appear throughout. *Id.*

Complainant correctly points out that, while the word "use" by itself is not specifically defined under FIFRA or its implementing regulations, it is clear from the definitions that the retail or wholesale "distribution or sale" of unapplied pesticides products is not included in meaning of the term "use." *See*, 7 U.S.C. 136(gg)("The term 'to distribute or sell' means to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver. The term does not include the holding or application of registered pesticides or use dilutions thereof by any applicator who provides a service of controlling pests without delivering any unapplied pesticide to any person so served."); 7 U.S.C. 136(e)("'certified applicator' means an individual who is certified under section 136i of this title as authorized to use or supervise use of any pesticide which is classified for restricted use. Any applicator who holds or applies registered pesticides . . .. only to provide a service of controlling pests without delivering any unapplied pesticide to any person so served is not deemed to be a seller or distributor of pesticides under this subchapter."); 7 U.S.C. 136(ee)("The term "to use any registered pesticide in a manner inconsistent with its labeling" means to use any registered pesticide in a manner not permitted by the labeling. . ."). *See also*, 40 C.F.R. 152.3, defining various types of use separately from the definition of "distribute and sell," indicating that the former involves applied pesticides and the latter does not.

Thus, even those States which are entitled to "primary enforcement responsibility" under FIFRA Section 26 by virtue of their enforcement program or a cooperative agreement, would only be entitled to such "primacy" as to "use" violations, and would not have "primary enforcement responsibility" for violations involving the distribution or sale of pesticides under FIFRA, such as those at issue here.

The question then arises as to whether EPA through any agreement - a cooperative agreement entered into pursuant to FIFRA Sections 26 and 27 or otherwise - voluntarily conditioned the exercise of its primary or concurrent enforcement authority over the pesticide sales violations at issue here, as the Tribunal in *Zoo Med* concluded it did there. Neither party has suggested that this is the case and neither party has proffered any Cooperative Agreement or other document, between for example, EPA and the State of California, or any of the other states involved in this action, assuming one applicable to the time period at issue here actually exists.[8]

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[8] This Tribunal was able to locate via the internet a 2005 "Cooperative Agreement Between the State of California Department of Pesticide Regulation, California Agricultural Commissioners and Sealers Association, and the United States Environmental Protection Agency, Region IX," http://www.cdpr.ca.gov/docs/county/cacltrs/penfltrs/penf2005/2005atch/ (continued...)

Moreover, it is noted that prior cooperative agreements specifically between EPA and the State of California as to FIFRA have been held *not* to vest enforcement rights in third parties (such as the alleged violator) and thus establish no jurisdictional prerequisites to suit, *even in regard to misuse violations*. *See, Evergreen Pest Control*, EPA Docket No. I.F.& R. IX-157C, 1977 EPA ALJ LEXIS 13 (ALJ, Sept. 29, 1977). *Cf., John Sauter*, EPA Docket No. FIFRA-02-2005-5103, 1995 EPA ALJ LEXIS 97 (ALJ Aug. 1, 1995)(EPA action for misuse not barred by EPA Cooperative Agreement with Colorado as it expressly provides that nothing in this Agreement is intended to usurp the authority of EPA to commence enforcement actions for alleged violations of FIFRA)*; Skarda Flying Service, Inc.*, FIFRA Docket No. VI-672C, 1994 EPA ALJ LEXIS 90 (ALJ Oct. 13, 1994)(EPA civil penalty action for application of pesticide misuse not barred or preempted; memorandum of understanding allows overfiling by EPA after giving notice to the state (Arkansas) if EPA determines state action is inappropriate).

Therefore, based upon all of the foregoing, it is hereby found that the State does *not* have "primary" enforcement jurisdiction over pesticide sales violations under Section 12(a)(1) of FIFRA, and thus EPA's right to file or overfile in regard to such violations is not limited or conditioned by either the statutory provisions of FIFRA or, in this case, any agreement between EPA and any State.

2. Is EPA's Right to Overfile for Sales Violations Limited by the Settlement Agreement between Respondent and the State under the Doctrine of Res Judicata?

In its Opposition, Respondent argues that even if EPA's has "concurrent enforcement authority" for the sales violations at issue in this case, "[i]t makes no practical sense to allow them both [EPA and California] to enforce the same violations," and that "EPA cannot not [sic] step in once the state has acted first." Further, Respondent adds that "EPA knew of the violations before Respondent's settlement with DPR. Why didn't they [sic] try to step in and pursue the violations at that time?" Opp. at 3. Respondent cites no legal doctrine in support of this argument. However, viewing it in the best light, it appears to be raising a *res judicata* defense - that EPA's right to overfile here is barred by virtue of the settlement agreement it entered into with the State. Support for such an argument can be found in the *Harmon* decision which alternatively held that the EPA's right to overfiling in that instance was barred by the *res judicata* effect of the consent agreement entered into by the state and the respondent in that case. To prevail on a *res judicata* defense a respondent must show: "(1) a final judgment or decree

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[8](...continued)
attach1901.pdf, which stated, "Nothing in this agreement will preclude the U.S. EPA from undertaking any enforcement action with respect to any act that constitutes a violation of FIFRA." *Id*. at 4. Thus, it does not appear to condition or bar EPA from taking the enforcement action here.

rendered on the merits by a court of competent jurisdiction; (2) concerning the same claim or cause of action as that now asserted; (3) between the same parties as are in the current action or their 'privies.'" *United States v. LTV Steel Co.*, 118 F. Supp. 2d 827, 835-836 (N.D. Ohio 2000).

A settlement of claims can work as a final judgment. *Sandpiper Vill. Condo. Ass'n v. Louisiana-Pacific Corp*., 428 F.3d 831, 853 (9th Cir. 2005)(a plaintiff, who was not a party or in privity with a party to a prior action and who asserts claims that were not resolved in the prior action, is not precluded from litigating its claims; parties who agreed to a settlement and released their claims remain bound.); *Coeur D'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094, 1118-1119 (D. Idaho 2003)("In the present case, the claim for natural resource damages under CERCLA is the same as in the state cause of action. There was a final judgment when the parties reached a settlement of the claims. The question then becomes was there privity between the State of Idaho and the United States."). Assuming *arguendo* that Respondent's Settlement Agreement (Opp. Ex. 2) with the State of California satisfies the first element of a *res judicata* defense, the issue becomes whether the California enforcement action raised the same claims or cause of action asserted here and whether there was privity between State of California and EPA.

The instant EPA action involves claims of violations arising from both intrastate and interstate sales by Respondent and while it appears that Respondent provided invoices reflecting its sales both to vendees within and outside of California during the State investigation, it does not appear that *inter*state sales were necessarily at issue in the State enforcement action. The CDPR Notices of Inspection dated March 30 and April 19, 2006 concerned suspected violations involving the "Sales and Distributions of Unregistered Pesticide Product [sic] ***in*** California." R's PHE Exs. 10, 12. The Letter dated August 10, 2006 from the CDPR to Respondent concerning the violations states that the inspection revealed "sales/deliveries of certain pesticides for ***use in*** California;" unregistered pesticides offered for sale and delivered by your company ***into or within*** California;" asked for data about sales "made ***into*** California;" notifies of it being unlawful to "sell or deliver ***into or within*** California;"and alleges Respondent sold and delivered "***into or within*** California" unregistered products in violation of the State Code. *See*, R's PHE Ex. 1. A subsequent letter advised Respondent of the inspection involving "sales/deliveries of certain pesticide products for ***use in*** California;" and that Respondent had provided data of total sales of the products "***for California delivery***." R's PHE Ex. 4. The Settlement Agreement states that "[i]n the course of the Department's regular inspection and auditing of pesticide sales ***into*** California, the Department discovered that the Company sold unregistered pesticide products ***in*** California . . . ." Opp. Ex. 2. It also states that "the Company agrees to take measures . . . to ensure that pesticides that are not registered by the Department are not sold or delivered ***into or within*** California for sale or use ***in*** California." Further, that "[t]his agreement is conditioned on the company's representation that the above-named products were not sold or delivered ***into or within*** California by the Company after the first quarter of 2006. . . ." and that "[t]he Company agrees not to sell or deliver any pesticide products ***into or within*** California for sale or use ***in*** California . . . " *Id*. Thus, it appears that the claims or causes of action resolved by the Respondent's Settlement Agreement with California may have covered only intrastate sales, and not interstate sales. Therefore, the doctrine of *res judicata* would not bar EPA's action regarding the interstate sales.

Moreover, even assuming the California action and the Settlement Agreement involved both Respondent's intra- and inter-state sales, it appears that the causes of action at issue in the State enforcement proceeding were only violations of State law and not Federal law, *i.e* FIFRA. While the State Violation Report notes that Respondent's actions would constitute a violation of FIFRA, the Respondent was only charged by the State with violations of California law, and the Settlement Agreement does not mention FIFRA at all. *See,* R's PHE Ex. 14 (Notices of Violation) and Opp. Ex. 3 (Settlement Agreement). *See also,* R's PHE Exs.10, 12 (Notices of Inspection dated March 30 and April 19, 2006 concerning suspected violations of "California Statutes" where the boxes specifically referring to FIFRA as the authorization for the inspection are *not* checked) and R's PHE Exs. 11, 13 (Receipt for Samples taken during each inspection where FIFRA authorization boxes are not checked). Rather, the Settlement Agreement provides in regard to the violations which are being resolved therein that "[t]he Company admits to violations of [California] Food and Agricultural Code sections 12992 and 12993 . . . ." Opp. Ex. 2. Violations of State law and Federal law are not same causes of action for *res judicata* purposes. *See, United States v. LTV Steel Co.*, 118 F. Supp. 2d 827, 836-837 (N.D. Ohio 2000)(settlement was premised upon an alleged violation of local law did not bar EPA action for violations of federal law). Therefore, the Settlement Agreement would not bar EPA bringing the instant action asserting violations of Federal law as a result of either intra- or inter-state sales.

In addition, there is also no evidence that the State and EPA were in privity with one another in regard to the State enforcement action sufficient for the doctrine of *res judicata* to apply to the Settlement Agreement between Respondent and the State. As noted in *LTV,*

> A general identity of interests, i.e., an interest in clean air [or pesticides], is not alone sufficient to bind the federal government to a decision in which it did not participate. Any preclusive effect must be determined, instead, by the level in which the United States actually participated in the previous enforcement efforts. [] In order to show that the United States was in privity with the City of Cleveland, the United States must have maintained a "laboring oar" in the earlier proceedings and settlement. [] "If the United States, in fact, employs counsel to represent its interest in a litigation or otherwise actively aids in its conduct, it is properly enough deemed to be a party and not a stranger to the litigation and bound by its results." [] To determine whether the United States has a laboring oar in a controversy, the Court may look to such things as whether the United States orders another party to file a lawsuit or, in this case, issue a notice of violation, pays the attorney's fees, reviews the complaint or notice, files an amicus brief, directs an appeal or the abandonment of that appeal or actually engages in settlement negotiations. [] The EPA in this case has done none of these things. The only involvement the EPA had in this case is that it was sent a copy of the final settlement. The EPA, thus, had no "laboring oar" in the City of Cleveland's prior enforcement efforts or in its settlement with LTV.

LTV Steel Co., 118 F. Supp. 2d at 836 (citations omitted).

Respondent has proffered no evidence that EPA had a "laboring oar," or, in fact, had any involvement whatsoever in the State enforcement action and EPA denies that was the case, claiming that the two enforcement actions "proceeded from the start on parallel but independent tracks," and that "Complainant's counsel did not speak to anyone at CA DPR (including inspector Elhawary), about either enforcement action until . . . January 2008 [over a year after the settlement agreement was signed]." Evidence proffered by Respondent supports this representation as counsel for CDPR stated to Respondent in December 13, 2006 e-mail issued after the State matter closed, that "I don't know anything about the EPA letter. California law makes it illegal to sell a pesticide in the state that is not registered with DPR. EPA often pursues different violations. You need to deal with EPA directly . . . ." R's PHE Ex. 8. Therefore, evidence of sufficient privity between EPA and the State required to support a *res judicata* defense has not been established.

Thus, because EPA's claim here is based on FIFRA, a wholly different law than the State enforcement action involved and EPA had no "laboring oar" in the State action, Respondent's prior settlement with the State of California has no *res judicata* effect on the instant claims.

C. Analysis - Respondent's Fairness/Equitable Estoppel Defense

Respondent has also raised in its Opposition as a defense to this action the issue of "fairness," asserting that it is simply not fair for EPA to be allowed to bring this enforcement action in addition to the State action, based upon the same inspection, especially after Respondent settled with the State believing that by doing so it had resolved its liability as to the pesticide sales. No recognized doctrine or precedent for such "unfairness" constituting a legal defense is cited in Respondent's pleadings. However, viewed in its best light, this argument could perhaps been seen as making out what appears in essence to be an "equitable estoppel" argument.[9] The elements of the defense of equitable estoppel as applied to the government are that the person raising the defense reasonably relied upon the government's actions to its detriment, and that the government engaged in some "affirmative misconduct." *BWX Technologies, Inc.*, 9 E.A.D. 61, 80 (EAB 2000)(citing *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995). "When equitable estoppel is asserted against the government, as here, a

[9] The term "bad faith" in regard to EPA bringing this enforcement action is used generally in connection with a "selective enforcement" defense where the respondent alleges it has been "singled out" by the government "invidiously or in bad faith, i.e., based upon such impermissible consideration as race, religion, or the desire to prevent the exercise of constitutional rights." *Newell Recycling Company, Inc*., 8 E.A.D. 598, 635 (EAB 1999). The burden of proof on the part of a proponent of "selective enforcement" is "rigorous," "demanding," "daunting," and "high." *See, e.g., B&R Oil Co.*, 8 E.A.D. 39, 51 (EAB 1998). In that Respondent has not alleged at any point that the Agency selected it for enforcement based upon any impermissible consideration, nor is there any proof of the same in the record, it appears that the fairness argument is not intended to make out such a defense.

party bears an especially heavy burden" and "[c]ourts have routinely held that 'mere negligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct sufficient to estop the government.'" *BWX*, 9 E.A.D. at 80 (quoting *Board of County Comm'rs of the County of Adams v. Isaac*, 18 F.3d 1492, 1499 (10th Cir. 1994). "At a minimum, the [government] official must intentionally or recklessly mislead the estoppel claimant." *United States v. Marine Shale Processors*, 81 F.3d 1329, 1350 (5th Cir. 1996). "The erroneous advice of a government agent does not reach the level of affirmative misconduct." *FDIC v. Hulsey*, 22 F.3d 1472, 1490 (10th Cir. 1994)(citing *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981). A finding of affirmative misconduct may be particularly unlikely when the respondent asserts estoppel against the Federal government based on erroneous advice from an official of a state government. "Allowing state representatives to estop the federal government in this case would provide the states with a mechanism for going below the federal floor of regulation required by RCRA." *Marine Shale Processors*, 81 F.3d at 1349.

Respondent has not proffered any evidence of any affirmative misconduct by EPA or even any State official in this case which could be the basis of an estoppel defense. It appears that Respondent, on its own, hoped or presumed that resolution of the claims made by the State would end its liability for all legal claims involving its sales of unregistered pesticides, but it has not alleged that any State or Federal official affirmatively represented to it that this would be the case. *See*, R's PHE Ex. 4(E-mail to CDPR sent after notification of the EPA action wherein Respondent indicates that it thought the matter would close upon payment to the State, but which does not allege that the State made any representations to it to that effect). Moreover, it is not clear that even if such a representation was ever made, that Respondent in any way relied upon the representation to its detriment. The only action Respondent arguably it took "in reliance" would be settling the various claims made against it by the State for $2,912 and such settlement does not appear in any way to have been to Respondent's detriment.[10]

Finally, while this Tribunal certainly understands Respondent's frustration and unhappiness with being sued twice for what it views as the same wrong, the fact is that that is how our federal system of laws works - a wrong may constitute a violation both of state law and federal law and as a result the violator may be subject to two actions. As stated by the court in *United States v. SCM Corp*., 615 F. Supp. 411, 420 (D. Md. 1985) -

> Nor is there any unfairness to the defendant in the Court's decision that this case may proceed despite defendant's entering into a consent order with the state agency. In a federal system, each person and entity is subject to simultaneous

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[10] Under California law, each pesticide violation carries a maximum penalty of a $5,000 fine, imprisonment of up to six months, or both. If the violation was intentional or negligent and "created or reasonably could have created a hazard to human health or the environment," the maximum penalty increases to a $50,000 fine, one year imprisonment, or both. Cal. Food & Agr. Code § 12996. The evidence proffered by Respondent indicates that the CDPR initially calculated the fine in accordance with its guidelines to be $3,994. R's PHE Ex. 4

> regulation by state and national authority. The single act of an individual frequently subjects that person to separate and differing legal consequences at the hands of state and national sovereigns. That the same acts by the defendant subject it to state actions under Title 2 of the Maryland Health and Environmental Code as well as EPA actions under the Clean Air Act is no more anomalous than the situation of the bank robber who finds himself simultaneously prosecuted for violations of both federal and state laws arising from a single criminal act.

The only limit on such duel liability is the Agency's exercise of discretion, and it is well recognized that the Agency is given "a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions." B&R Oil Co., 8 E.A.D. 39, 51 (EAB 1998). Unfortunately for Respondent, the Agency decided to exercise its discretion in this case by filing an enforcement action against it after the State had done so. While that makes this action "unfair" in the eyes of the Respondent, such unfairness simply does not rise to the level of a valid defense.

CONCLUSION

Respondent is found to have violated FIFRA Section 12(a)(1)(A) as alleged in Counts 1 through 22 of the Complaint.

ORDER

1. Complainant's Motion for Partial Accelerated Decision is **GRANTED**.

2. Within 15 days of this Order the parties shall engage in a settlement conference and attempt in good faith to reach an amicable resolution of this matter. Complainant shall file a status report as to the status of settlement discussions on or before **June 15, 2008.**

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Susan L. Biro
Chief Administrative Law Judge

Dated: May 29, 2008
Washington, D.C.